

* * * NOT FOR PUBLICATION¹ * * *
POST ON COURT'S WEBSITE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re:

ROBERT LEE HAYES,

Debtor.

No. 09-42990

ALLAN KANOUFF; and
RAEANN NELSON,

Plaintiffs,

Adversary No. 09-4123

vs.

ROBERT LEE HAYES,

Defendant.

**ORDER ON MOTIONS and
GRANTING SUMMARY JUDGMENT TO
PLAINTIFFS**

1. Service Objection:

Having considered the documents filed in response to the Procedural Order (Docket No. 40): Defendant's service objection (docket no. 44) is **OVERRULED**. LBR² 5005-1(c)(2).

¹ **THIS ORDER IS NOT APPROVED FOR PUBLICATION AND MAY NOT BE CITED EXCEPT WHEN RELEVANT UNDER THE DOCTRINE OF LAW OF THE CASE OR OF PRECLUSION.**

² Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act

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1 **2. Request for Judicial Notice:**

2 The request for judicial notice of the state court orders
3 identified in the procedural order is **GRANTED**: Defendant's objection
4 and amended objection (docket nos. 41 and 42) simply ignore the fact
5 that, as noted in the Procedural Order . . . the state court orders are
6 self-authenticating as public documents under seal and as certified
7 copies of public records, FRE 902(1) and (4). As noted in the
8 Procedural Order, counsel for Plaintiffs brought the original certified
9 copies, with seals, to court, Defendant had the opportunity there and
10 then to view them, and the copies attached to the Procedural
11 Order . . . were made from those certified copies.

12 Defendant's argument that the various state court judges made oral
13 rulings which are not reflected in those orders is misplaced: for the
14 purposes of the request for judicial notice, the adjudicated facts of
15 which I am taking judicial notice are the entry of those orders by the
16 pertinent state courts. In re Bestway Products, Inc., 151 B.R. 530,
17 539-40 (Bankr. E.D. Cal. 1993). While those orders may or may not have
18 implications respecting the merits of the adversary proceeding, or the
19 summary judgment motion, those possibilities are not relevant to the
20 taking of judicial notice. Nor is the correctness or propriety of the
21 state courts' entries of the orders a criterion for taking judicial
22 notice of them.

23 _____
24 of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23. "RCW" references are
25 to the Revised Code of Washington.

26 "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure, and "LBR" to the Local Bankruptcy Rules of this district.
28 "FRE" references are to the Federal Rules of Evidence.

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1 Moreover, a court's written findings control over any apparent
2 inconsistency with an earlier oral ruling. Hong v. United States, 363
3 F.2d 116, 120 (9th Cir. 1966); Shellenbarger v. Brigman, 101 Wash. App.
4 339, 346 (2000). The case cited by Defendant for the contrary
5 proposition, United States v. Fifield, 432 F.3d 1056, 1059 (9th Cir.
6 2005), involved sentencing in a criminal case. The rule that the oral
7 pronouncement of a sentence controls over a written judgment is
8 predicated on a criminal defendant's constitutional right to be present
9 and speak at his own sentencing, see United States v. Bergmann, 836 F.2d
10 1220, 1222 (9th Cir. 1988), a circumstance not present here.

11 In any event, it is simply not subject to reasonable dispute that
12 the state courts entered the orders in question: those facts are
13 capable of accurate and ready determination, and the source of the
14 certified copies cannot be reasonably questioned.

15
16 **3. Dispositive Motions:**

17 A. Defendant's motion for judgment on the pleadings (Docket
18 No. 13):

19 Defendant moves for dismissal of the complaint, citing FRCP 12(c)
20 and (d), on the basis that plaintiffs have failed to state sufficient
21 facts on which relief may be granted. However, Defendant's pleadings
22 fail to cite or address relevant authority, and the complaint, when
23 considered together with its attachments, meets the standards set forth
24 in Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949-50 (2009); see
25 also Moss v. U.S. Secret Service, 572 F.3d 962, 967-69 (9th Cir. 2009).

26 The motion for judgment on the pleadings is **DENIED**.

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1 B. Plaintiffs' motion for summary judgment (Docket No. 7):

2 i. 523(a)(6) Elements:

3 Section 523(a)(6) of the Bankruptcy Code provides that an
4 individual debtor may not discharge a debt "for willful and
5 malicious injury by the debtor to another entity or to the
6 property of another entity." (emphasis added). The malicious
7 injury requirement is separate from the willful injury
8 requirement. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47
9 (9th Cir.2002) (conflating the two requirements is grounds for
10 reversal); see also Jett v. Sicroff (In re Sicroff), 401 F.3d
11 1101, 1105 (9th Cir.2005) ("We analyze the willful and
12 malicious prongs of the dischargeability test separately.").
A "willful" injury is a "deliberate or intentional injury, not
merely a deliberate or intentional act that leads to injury."
Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S.Ct. 974, 140
L.Ed.2d 90 (1998) (emphasis in original). "A 'malicious'
injury involves' (1) a wrongful act, (2) done intentionally,
(3) which necessarily causes injury, and (4) is done without
just cause or excuse." " In re Su, 290 F.3d at 1146-47
(quoting Petralia v. Jercich (In re Jercich), 238 F.3d 1202,
1209 (9th Cir.2001)).

13 In re Barboza, 545 F.3d 702 , 706 (9th Cir. 2008).

14
15 ii. Preclusion?

16 This court must give the state court orders the same preclusive
17 effect as a Washington court would. See 28 U.S.C. § 1738, the Full
18 Faith and Credit statute, and In re Nourbakhsh, 67 F.3D 798, 801 (9th
19 Cir. 1995).

20 Collateral estoppel (issue preclusion) in Washington courts
21 requires: "(1) identical issues; (2) a final judgment on the merits; (3)
22 the party against whom the plea is asserted must have been a party to or
23 in privity with a party to the prior adjudication; and (4) application
24 of the doctrine must not work an injustice on the party against whom the
25 doctrine is to be applied." Hadley v. Maxwell, 144 Wash. 2d 306, 311,
26 27 P.3d 600, 602 (2001) (internal quotation omitted).

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1 iii. Analysis:

2 Sanctions imposed for filing frivolous legal claims in state court
3 may be nondischargeable under § 523(a)(6), if the requirements of issue
4 preclusion are met. In re Zelis, 66 F.3d 205, 208 (9th Cir. 1995)
5 (sanctions for frivolous appeal); see also Ball v. A.O. Smith Corp., 451
6 F.3d 66 (2d Cir. 2006) (sanctions under 28 U.S.C. § 1927).

7 Here, the Pierce County District Court awarded costs, attorney's
8 fees, and sanctions pursuant to RCW 4.84.185³ and the pertinent discovery
9 and pleading rules, and in equity. The District Court found, in
10 relevant part:

11 2. Hayes' claims in this case have been advanced without
12 reasonable cause and with a malicious motive.

13 3. The entire action and claims put forth by Hayes are
14 frivolous.

15

16 5. Hayes had multiple improper or ulterior purposes for
17 initiating his claims and defenses in this lawsuit, and for
18 abusing legal process in this lawsuit, including:

19 a) to the Defendants [sic] to respond to the legal
20 proceedings and to appear in court,

21 b) to increase the Defendants['] litigation costs
22 and cause unnecessary delay,

23 c) to extort time, money and resources from the
24 Defendants,

25 d) to intimidated [sic] the Defendants, and

26 e) to annoy and harass the Defendants.

27 ³Which provides, in relevant part:

28 In any civil action, the court having jurisdiction may, upon
written findings by the judge that the action, counterclaim,
cross-claim, third party claim, or defense was frivolous and advanced
without reasonable cause, require the nonprevailing party to pay the
prevailing party the reasonable expenses, including fees of attorneys,
incurred in opposing such action, counterclaim, cross-claim, third
party claim, or defense. . . .

1

2 8. Hayes has subjected Defendants to his oppressive
3 conduct, bad faith, malicious motives, ulterior purposes, and
4 abuse of the legal process.

5 Order Granting Defendants' Motion to Dismiss, pages 2-3, attached to
6 Declaration of Allan Kanouff (docket no. 8).

7 The Pierce County Superior Court affirmed the District Court's
8 findings and conclusions in its order entered 8 July 2008, and awarded
9 additional sanctions "under the same basis as awarded by the District
10 Court." The Washington State Court of Appeals, Division II, affirmed.

11 The elements of issue preclusion are met here. Both matters
12 involve the same parties, and the identical issues: whether Hayes'
13 conduct was willful and malicious. The state court explicitly found
14 that Hayes acted with intent to injure defendants (i.e., by causing them
15 to incur fees, and to annoy and harass them), and that he acted
16 maliciously. The state court orders are final, and Hayes articulates no
17 basis for finding that application of the doctrine would work an
18 injustice - he just disagrees with the results.

19 The motion for summary judgment is **GRANTED**.

20 iv. Extent:

21 In Cohen v. de la Cruz, 523 U.S. 213 (1998) the Supreme Court
22 construed "debt" in the 11 U.S.C. § 523(a)(2)(A) subsections excepting
23 from discharge "debt. . . for money, property, services, or an
24 extension, renewal, or refinancing of credit, to the extent obtained by
25 . . . false pretenses, a false representation, or actual fraud" to mean
26 the entire debt arising from the specified conduct. Subsection

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1 523(a)(6) is so constructed; it follows, as Hayes's entire liability at
2 state law is predicated on willful and malicious conduct, all of the
3 sanctions and attorney fees are nondischargeable. In re Roussos, 251
4 B.R. 86, 95 (9th Cir. BAP 2000), aff'd, 33 Fed. Appx. 365, 2002 WL
5 726489 (9th Cir. 2002). This is true even with respect to the
6 additional fees and costs imposed as sanctions by the Superior Court and
7 the Court of Appeals. Although neither court's award contains findings
8 of willful and malicious conduct, both explicitly affirmed the District
9 Court's findings. Thus those amounts are included as part of the total
10 debt arising from that conduct.

11
12 **4. Conclusion:**

13 Accordingly, I will enter judgment for plaintiffs, holding the
14 sanctions awarded by the state courts nondischargeable under
15 § 523(a)(6), which plaintiffs shall note for presentation on my
16 10 February 2010 calendar.

17 **/// - END OF ORDER - ///**

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19 

20 Philip H. Brandt
United States Bankruptcy Judge
(Dated as of "Entered on Docket" date above)

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1 CERTIFICATE OF SERVICE:
2 I CERTIFY I SERVED COPIES OF
3 THE FOREGOING (VIA U.S. MAIL,
4 FACSIMILE, OR ELECTRONICALLY) ON:

5 Joseph W. McIntosh
6 Email: josephm@schweetlaw.com
7 (Allan Kanouff; RaeAnn Nelson)

Robert Lee Hayes
POB 44379
Tacoma, WA 98448

8 Laurin S. Schweet
9 Email: laurins@schweetlaw.com
10 (Allan Kanouff; RaeAnn Nelson)

11 DATE: January 26, 2010

12 BY: /s/ Juanita C.Kandi
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